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No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONERS

v.

ALFRED E. COLEMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (A. 47), is reported at 363 F. 2d 190, and its order on rehearing (A. 77), confirming its prior opinion, is reported at 379 F. 2d 555.

JURISDICTION

The judgment of the court of appeals (A. 68) was entered on June 21, 1966. A timely petition for rehearing was granted on February 8, 1967 (A. 76), and on rehearing the court confirmed its prior decision by order entered June 20, 1967. The petition for a writ of certiorari was filed on September 18, 1967, and

granted on December 4, 1967 (A. 78). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior exceeded his statutory authority in ruling that, to establish the discovery of a "valuable" mineral deposit within the meaning of the mining laws (30 U.S.C. 22), an applicant for a patent to public lands must show that the stone on which the claim is based can be marketed at a profit.

2. Whether the Secretary of the Interior exceeded his statutory authority in ruling that building stone can be a "common variety" of stone within the meaning of 30 U.S.C. 611.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. 22, provides:

> That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 1 of the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. 161, provides in pertinent part:

> That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: * * *

Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611, provides:

> A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more.

Section 1 of the Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. 601, provides in pertinent part:

> The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) and vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) on public

lands of the United States, including, for the purposes of this Act, land described in the Acts of August 28, 1937 (50 Stat. 874), and of June 24, 1954 (68 Stat. 270), if the disposal of such mineral or vegetative materials (1) is not otherwise expressly authorized by law, including, but not limited to, the Act of June 28, 1934 (48 Stat. 1269), as amended, and the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary: * * * As used in this Act, the word "Secretary" means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes * * *.

STATEMENT

This is an action for ejectment commenced by the United States to oust respondents from 720 acres in the San Bernardino National Forest[1] on which respondent Coleman and his wife had located 18 placer

[1] The San Bernardino National Forest is located in the San Bernardino Mountains approximately 2 hours' drive due east from Los Angeles. It is one of 154 National Forests located in 39 States and Puerto Rico which contain an aggregate of 182,000,000 acres. These National Forests are comprised principally of portions of the public domain designated by the President or by Congress (16 U.S.C. 471–538) for management by the Department of Agriculture in a manner designed to assure an optimal utilization of their commercial and non-commercial values. Thus, as in other National Forests, areas within the San

mining claims.[2] Respondent McClennan holds a lease from Coleman, executed in May 1958 (A. 145), which purports to authorize McClennan to remove sand and gravel from the land. Respondents counterclaimed, seeking an order directing the United States to instruct the Secretary of the Interior to issue Coleman a fee patent to his mining claims. The Court of Appeals for the Ninth Circuit, reversing the district court, denied the government's prayer for ejectment, set aside a decision of the Secretary of the Interior rejecting Coleman's application for a patent, and remanded the case to the Department of the Interior.

The underlying circumstances are these. Coleman applied to the Department of Interior in 1956 for the issuance of a patent, asserting that between 1949 and 1955 he had located 18 placer mining claims for quartzite.[3] The application was predicated on the Act of May 10, 1872 (30 U.S.C. 22, *supra*, p. 2), under which land owned by the United States containing "valuable

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Bernardino Forest are set aside as unspoiled wilderness; in other areas recreational facilities are provided, including camp sites and skiing facilities, and licensed hunting and fishing is allowed; in some areas commercial grazing and sustained-yield timber harvesting is permitted under license or contract to the extent consistent with the conservation of replenishable resources and water-shed protection. As with other lands within the public domain, National Forest lands are generally open to entry for the prospecting, locating and developing of mineral resources under the federal mining laws (16 U.S.C. 478).

[2] A "placer" mining claim is a claim for a mineral deposit that is not in the form of a vein or lode.

[3] Quartzite is "a compact granular rock composed of quartz"; quartz is "the most common of all solid materials." *Webster's New International Dictionary* (2d ed.).

mineral deposits" may be purchased by a discoverer for $2.50 per acre (30 U.S.C. 37), and on the Act of August 4, 1892 (30 U.S.C. 161, *supra,* pp. 2–3), under which the 1872 Act was made applicable to "lands that are chiefly valuable for building stone." Coleman claimed that the quartzite deposits qualified as building stone and as valuable mineral deposits.

The validity of the respondents' mining claims was challenged at the request of the Forest Service of the Department of Agriculture. At the administrative hearing, two expert witnesses testified for the government that the quartzite claimed by Coleman was but a small part of an immense quantity of similar stone found in the area. The stone could be used as a building material, but was very heavy and expensive to handle, would split unpredictably, and involved a great deal of waste since it cannot be worked into thin layers for facing or surfacing (A. 9). This type of stone was not inventoried by local suppliers of stone building materials because of the lack of demand for it (A. 126). Coleman's records indicated that during a ten-year period he had sold approximately 1,000 tons of the stone at an average price of $12 a ton (A. 106–107). It was the opinion of one of the government's witnesses that the prospects for an economic mining operation were not such as would justify a prudent man in spending his time and money (A. 117).

Coleman testified that he has spent 45,000 hours working on the claims and that he valued his labor at the rate of $3.50 per hour or an aggregate of $157,500 (A. 165–166). He also testified that he had spent approximately $17,200 on improvements (A. 8).

These expenditures of time and money had gone largely into the construction of a residence, domestic water supply and sewage disposal facilities, and access roads (A. 8–9). Respondent McClennan testified that, under a royalty lease from Coleman, he was permitted to extract sand, gravel and severed rock, not including building stone, and that he had marketed more than $4000 worth of such material in the first 2½ months of operations under the lease (A. 8, 144).[4]

The hearing examiner concluded from the evidence that so limited a market for the building stone had been shown as to warrant the validation of only 5 of the 18 claims (A. 190). On appeal, the Acting Director of the Bureau of Land Management held that a market had only been shown for building stone from 3 claims and a portion of a fourth, which were the most developed of the eighteen. On cross appeals by Coleman and the Forest Service, the Secretary of the Interior ruled that all eighteen claims were invalid.[5] The Secretary held that to qualify as a "valuable mineral deposit" under 30 U.S.C. 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit" (A.

[4] It should be noted that under the view of the Secretary, as developed below, McClennan's sales are irrelevant to the issue of discovery since they occurred after the Act of July 23, 1955.

[5] The final decision of the Department of the Interior was rendered by the Deputy Solicitor pursuant to authority delegated by the Secretary of the Interior. See Departmental Manual, Sec. 210.2.2A(4)(a); 24 Fed. Reg. 1348.

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11). The Secretary's opinion notes that, even if Coleman's capital expenditures could be amortized, "the great disparity between his own estimate of the value of the mineral actually marketed from the claims and the costs of doing so indicates the absence of any element of profit" (A. 12). The Secretary also held that the validity of the claims was to be determined as of July 23, 1955, because 30 U.S.C. 611, which became effective on that date, declared that "[a] deposit of common varieties of * * * stone * * * shall not be deemed a valuable mineral deposit within the meaning of the mining laws * * *." The opinion concluded that "[i]n view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety'" (A. 11).

Coleman did not seek to obtain judicial review of the final departmental decision. Nor did he relinquish possession of the land. Accordingly, the United States instituted this action in the United States District Court for the Southern District of California seeking to eject Coleman and his lessee and to recover damages. Respondents counterclaimed (A. 13) seeking an order directing the United States to instruct the Secretary of the Interior to issue patents for the mining claims. The district court granted summary judgment for the United States on the prayer for ejectment, dismissed the counterclaim and awarded damages to the United States in the sum of $1,877.50 (A. 43, 45).

The court of appeals reversed on the ground that the test of profitable marketability was not a proper

standard for determining whether a discovery of a valuable mineral deposit under 30 U.S.C 22 had been made and that building stone could not be deemed a common variety of stone under 30 U.S.C. 611. It ordered the case remanded to the Department (A. 67). The United States petitioned for a rehearing (A. 69), asserting, *inter alia,* that the court had no jurisdiction to issue orders to the Secretary of the Interior in a case to which he was not a party. By order of January 3, 1967, the court of appeals granted the Secretary of the Interior 30 days within which to move to be joined as "a counterclaim defendant and appellee" and provided that, if he were so joined, he would be given leave to file a brief and present oral argument (A. 74). The Secretary moved to be joined as a party and rehearing was granted (A. 76). After rehearing, the original judgment and opinion of the court were affirmed (A. 77). This Court granted certiorari.

ARGUMENT

INTRODUCTION AND SUMMARY

This case raises two issues of statutory construction under the federal mining laws—laws whose administration has for a century been confided to the Secretary of the Interior. In each instance the Court of Appeals for the Ninth Circuit, declining to consider whether the Secretary's interpretation was a reasonable one, rejected that interpretation, notwithstanding this Court's adjuration that "great deference" is due the interpretation given a statute by the

"agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16.

1. The first issue arises under the Act of May 10, 1872 (30 U.S.C. 22), which provides that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title to the land on which such deposits are located by application to the Department of the Interior. In ruling on such applications, the Secretary has long held that to qualify as a "valuable" mineral deposit it must appear that a prudent man "would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." *Castle* v. *Womble,* 19 L.D. 455, 457 (1894). Furthermore, in an effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable", in cases where the question of value is a close one requiring careful analysis, as is generally true with non-metallic minerals of widespread occurrence, the Secretary has for decades held that the validation of a claim requires a showing that the minerals can be extracted, removed and marketed at a profit. In the present case, the Secretary held that respondent's discovery of quartzite stone did not qualify as a valuable mineral deposit because the stone could not be marketed at a profit.

The court of appeals, while acquiescing in the prudent man test, held that the marketability test was not authorized by law. The court rejected the marketability test, first, because it supposed that it involved the imposition of a different and more onerous stand-

ard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent man test. The marketability test and the prudent man test are, however, not essentially distinct standards. Rather, they are merely two ways of articulating the proposition that Congress intended to authorize the disposition of public lands under the mining laws only upon the discovery of minerals that are valuable in an economic sense and, hence, that minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation should not be deemed valuable. The notion that a valuable mineral deposit must be one susceptible of profitable operation has always been regarded as an aspect of the prudent man test. The utility and office of the marketability test is that it serves to focus attention on the factors requiring particular scrutiny whenever the economic feasibility of mining operations are open to real doubt.

The court of appeals objected further to the marketability test on the ground that it was, at most, relevant to the issue of whether the claimant intended in good faith to utilize the land for mining purposes or, instead, sought the land for ulterior purposes—an issue that the court regarded as unrelated to the issue of value. The two issues are, however, intimately related. Evidence that a mineral deposit cannot be operated at a profit will naturally cast doubt on the claimant's *bona fides;* and evidence that the claimant seeks the land for purposes other than mining may well suggest that the minerals lack economic value.

In all events, a finding that the deposit cannot be profitably operated suffices to invalidate a claim even if it is supposed that the claimant would quixotically attempt to operate it at a loss.

Finally, the court of appeals took exception to the marketability test insofar as its emphasis on a present market distinguishes it from the forecast of the reasonably anticipatable future said to be implied by the prudent man test. The court apparently supposed that the Department has required evidence that minerals have actually been sold, whereas all that is in fact required is evidence that they probably can be sold profitably. Where sales have been made, the costs involved and the prices realized are of course relevant in determining the economic value of the deposit. Furthermore, it has never been thought sufficient for a mineral claimant to prove a purely speculative value predicated on some indeterminate future rise in prices or decline in costs. Validation of claims based on conjectural market fluctuations would merely assist private investors wishing to stockpile the public domain. Lastly, it is particularly inappropriate to issue patents to public lands on the basis of speculative future values where, as is commonly the case with sand, stone and gravel, the minerals can at best be profitably sold only within a relatively localized market within which demand depends on the fortuities of particular projects such as road and housing construction at a particular time.

2. The second issue of statutory interpretation arises under the Act of July 23, 1955 (30 U.S.C. 611) which provides that "common varieties" of sand,

stone and gravel, *inter alia,* "shall not be deemed a valuable mineral deposit" under the mining laws. The court of appeals, rejecting the Secretary's determination that respondents' quartzite building stone is a common variety of stone within the meaning of that act, held that building stone could not be a common variety. To hold otherwise, the court believed, would necessitate the conclusion that in enacting Section 611 Congress intended to repeal, *sub silentio,* the Act of August 4, 1892 (30 U.S.C. 161), which makes the mining laws applicable to land that is "chiefly valuable for building stone." In reaching this conclusion the court ignored the legislative history of the 1955 legislation which demonstrates beyond doubt that Congress intended to reach common varieties of building stone. Nor does the Secretary's interpretation of the 1955 legislation assume an intent to repeal the 1892 Act, as the court below supposed. That provision remains operative as to relatively rare and uncommon varieties of building stone.

I. THE SECRETARY'S DETERMINATION THAT A "VALUABLE MINERAL DEPOSIT" IS ONE FROM WHICH MINERALS CAN BE EXTRACTED AND MARKETED AT A PROFIT IS A REASONABLE INTERPRETATION OF THE STATUTORY LANGUAGE

Since 1872 the federal mining laws have authorized citizens to explore, discover and extract valuable minerals from the public domain and to obtain fee title to lands containing such discoveries. 17 Stat. 91, 30 U.S.C. 22. The obvious intention has been to stimulate and encourage the development of the nation's mineral wealth by rewarding the successful prospector with the opportunity to acquire, at a price of $2.50 an

acre, title to the land in which the minerals are discovered. To qualify for that reward, the prospector must show that he had located a "valuable mineral deposit." Interpretation and application of that somewhat vague statutory term has been the task of the Department of the Interior which, acting "as a special tribunal," is authorized to administer the laws "regulating the acquisition of rights in the public lands," and of the Secretary of the Interior who is "charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved * * *." *Cameron* v. *United States,* 252 U.S. 450, 460; *Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334, 337.

At an early date, the Secretary of the Interior ruled that to qualify as a "valuable" mineral deposit under 30 U.S.C. 22, a deposit must be of such character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." *Castle* v. *Womble,* 19 L.D. 455, 457 (1894). This so-called "prudent man" standard has been sustained by this Court on a number of occasions. See, *e.g., Chrisman* v. *Miller,* 197 U.S. 313, 322; *Cameron* v. *United States, supra,* at 459; *Best* v. *Humboldt Placer Mining Co., supra,* at 335–336. In an effort to provide a still more objective and precise guide to the significance of the term "valuable"—in cases concerning non-metallic minerals of widespread occurrence where a determination of valuableness requires a more focussed and incisive anal-

ysis—the Secretary has long held that the validation of a claim requires a showing that the minerals can be "extracted, removed and marketed at a profit." *Layman* v. *Ellis,* 52 I.D. 714, 721 (1929). See *Stanislaus Electric Power Co.,* 41 I.D. 655, 660 (1912); *Taking of Sand and Gravel from Public Lands for Federal Aid Highways,* 54 I.D. 294, 296 (1933); *United States* v. *Barngrover,* 57 I.D. 533 (1942); *United States* v. *Foster,* 65 I.D. 1 (1958), affirmed *sub nom. Foster* v. *Seaton,* 271 F. 2d 836 (C.A.D.C.). The Secretary's decision that Coleman's discovery of quartzite building stone failed to qualify under Section 22 was squarely based on this latter formulation of the statutory requirement in light of the finding that there existed no market at which the stone could profitably be sold.

The court of appeals, while acquiescing in the prudent man test, held that application of the marketability test was unauthorized, arbitrary and an abuse of discretion. The grounds on which the court based this conclusion appear to be threefold. First, the court believed that imposition of the marketability test implied different standards for minerals of widespread and of limited occurrence, whereas nothing in the mining laws justifies such a distinction (A. 59). Second, the court believed that the decisions in which the marketability standard was enunciated and affirmed were addressed to the question of the claimants' good faith—that is, to whether the claims were made with an intention to use the lands for purposes other than mining—and were not concerned with whether the minerals involved were valuable (A.

60). Third, the court appears to have objected to the marketability test insofar as it emphasizes a present as opposed to a prospective or eventual market (A. 60).

We set forth below the reasons why we believe that each of these grounds of decision is unsound. As a preliminary matter, however, we point out that the court of appeals, though "faced with a problem of statutory construction," declined to show the "great deference to the interpretation given the statute by the officers or agency charged with its administration" that this Court has thought appropriate. *Udall* v. *Tallman*, 380 U.S. 1, 16. Given the fact that more than a century ago the Department of the Interior was "granted plenary authority over the administration of public lands, including mineral lands" (*Best* v. *Humboldt Placer Mining Co.*, *supra*, at 336) and that it acts "as a special tribunal" for the validation or invalidation of claims to the public domain (*Cameron* v. *United States*, *supra*, at 459), we believe that only the most compelling considerations would have justified the court below in rejecting a statutory interpretation to which the Department has adhered for at least five decades. That it did so not in any proceeding to review the Secretary's decision but in a collateral action to which the Secretary was not initially a party and in which the court's jurisdiction was confined within the relatively narrow precincts afforded by an action in the nature of mandamus under 28

U.S.C. 1361[6] only serves to underscore the unusual nature of the decision.

1. The court below proceeded on the assumption that the Secretary's invocation of the marketability test—which it conceived to be a significant departure from the time-honored prudent man test—imposed a different and heavier burden on the discoveror of minerals of widespread occurence than that borne by the discoveror of rare minerals—a difference of treatment which could not be justified under the single statutory term, "valuable." It seems evident upon analysis, however, that the prudent man test and the profitable marketability test are not essentially distinct standards; rather, the latter is simply a refinement of the former.The interrelationship of the two formulations is apparent from the observation that "a prudent man

[6] The Secretary consented to be joined as a party to this case, at the court's suggestion while rehearing was pending, only pursuant to 28 U.S.C. 1361. As the legislative history shows, that section was designed to confer upon the federal courts generally a jurisdiction over federal officials formerly exercised only by the United States District Court for the District of Columbia. Cf. *Blackmar* v. *Guerre*, 342 U.S. 512; *Ernst* v. *Secretary of the Interior*, 244 F. 2d 344 (C.A. 9). It was not designed to enlarge the limited function of the writ of mandamus. See *Prairie Bank of Pottawatomie Tribe of Indians* v. *Udall*, 355 F. 2d 364 (C.A. 10); S. Rep. No. 1992 on H.R. 1960, 2 U.S. Cong. News, 87th Cong., 2d Sess. (1962), p. 2785; *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549, 555.

would not be justified in developing a mineral deposit if the extracted minerals were not marketable." *Marketability Rule,* 69 I.D. 145, 146 (1962). Both formulations reflect the assumption that Congress, in authorizing the disposition of public lands under Section 22, intended to reward and encourage the discovery of minerals that are valuable in an economic sense. No public purpose would be served by disposing of public lands upon the discovery of minerals which, whatever their subjective or metaphysical value, no prudent man will extract because the demand is insufficient to sustain a price higher than the cost of extraction and transportation.

Of course, assessment of the economic value of a large and rich deposit of a precious metal such as gold or silver presents scarcely any problem. The great demand for such minerals and the small supply ordinarily combine to create a price so high as to leave little room to doubt that they can be extracted, removed and marketed at a profit and that a prudent man would not be likely to leave them buried in the ground. Where, however, a deposit is of low grade or the demand for the mineral is small relative to the supply, a much more searching analysis is clearly called for. The function of the marketability test is to focus attention on one of the factors requiring scrutiny: Is there a realistic demand for the mineral at a price sufficiently high to cover the costs of extraction and transportation? Obviously, this question is more often critical in proceedings involving non-metallic minerals of widespread occurrence. But the fact is that the

marketability test is applicable to all minerals. See *Marketability Rule,* 69 I.D. 145.

Thus, the Department has rejected a claim based on a deposit of low-grade manganese where shipping costs were found to exceed the selling price of the ore. *Julius R. Gugliemetti,* A–27871 (May 13, 1959). Similarly, the Department recently denied patent applications based on discoveries of iron and titanium, observing that "the record must contain evidence of probable costs of extracting, processing, and transporting the mineral product for comparison with the price for which it could be sold. These facts need not be proved to a certainty but the evidence must be of such character taken with all the other evidence to satisfy the Secretary that a person of ordinary prudence would probably make a profit from his investment of labor and capital." *United States* v. *New Jersey Zinc Co.,* 74 I.D. 191,196 (1967). Accordingly, the court below was mistaken in supposing that the marketability test involved a double standard or imposed a more onerous burden with respect to minerals of widespread occurrence. The difficulties of proof with respect to such minerals do not stem from the standard imposed but precisely from the marginal nature of the economic value that such minerals possess.

Furthermore, the notion that profitability is a requisite to establishing a mineral deposit's valuable character is not the relatively recent development that the court below supposed. *Castle* v. *Womble,* 19 L.D. 455 (1894), the opinion which first articulated the prudent man test, referred to the development of "a

paying and valuable mine" (at 457, emphasis added). And in *Cataract Gold Mining Co.*, 43 I.D. 248, 254 (1914) it was held that to qualify under the statute, "the mineral deposit must be a 'valuable' one; such a mineral deposit as can probably be worked profitably; for, otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws." Indeed, as early as 1888, this Court observed, "If the land contains gold or other valuable deposits in loose earth, sand or gravel which can be *secured with profit,* that fact will satisfy the demand of the government as to the character of the land as placer ground * * *." *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673, 684 (emphasis added).

2. The court of appeals took further exception to the marketability test as applied here on the ground that *Layman* v. *Ellis*, 52 I.D. 714, in which that test was enunciated in its present form, and *Foster* v. *Seaton*, 271 F. 2d 836, in which the test was sustained by the District of Columbia Circuit, were both primarily concerned "to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining" (271 F.2d at 838), and hence with the *bona fides of* the claimant—an issue which was not tendered with respect to Coleman's claim and which the court below regarded as "substantially unrelated to the factual determination of discovery of a 'valuable' mineral under the *Castle* v. *Womble* criteria" (A. 60). The court was mistaken, however, in supposing that the

value of a claim and the good faith of the claimant are unrelated issues. Evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Conversely, evidence that a claimant has no intention of conducting a mining operation may at least cast serious doubt on the economic value of the minerals he has discovered. "The good faith of the applicant and the use to which he has devoted or may intend to devote the land is a proper element for consideration as incidental to, and throwing light upon, the real value and character of the land sought." *Stanislaus Electric Power Co.*, 41 L.D. 655, 659 (1912).

Indeed, the facts of this case—the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and "the immense quantities of identical stone found in the area outside the claims" (A. 11)—might well be thought to raise a substantial question as to Coleman's *bona fides*. But it is not necessary to negative the possibility that Coleman will quixotically attempt to operate the quarry at a loss.[7]

[7] The court of appeals, noting that "the history of prospecting and mining in the Western United States records the essence of individualism," observed that "[a]cademic economics has little meaning for a miner and his 'profit' is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor" (A. 66). This exercise in nostalgia for the grizzled prospector of the frontier is of little help in formulating a standard that must equally be applied to the claims of great mining corporations, which can hardly be sup-

Where the Secretary finds that the minerals cannot be extracted, removed and marketed at a profit, the claim may be rejected without going on to determine whether the claimant does or does not intend in good faith to operate a mine. The fact that there is no demand for the stone at a price higher than the costs of extraction and transportation suffices to prove that the deposit is not economically valuable and hence that there is no basis for patenting to Coleman 720 acres of a national forest.

3. Finally, the court of appeals appears to have objected to the marketability test insofar as it requires a showing of *present* marketability whereas "[t]he *Castle* v. *Womble* test implies a forecast of the reasonably anticipable future" (A. 65). We note, in the first place, that the Department has never required a showing that minerals have actually been marketed, but only that there is a market in which they can be profitably marketed. Where, as here, minerals have in fact been extracted and sold, the costs involved and the prices realized may of course be taken into consideration in determining the economic value of the deposit. Here, Coleman's actual experience in selling the stone supported the conclusion that it could not be sold at a profit.

Secondly, it has never been thought sufficient for a mineral claimant to prove a purely speculative value, and it seems altogether implausible that Con-

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posed to disregard their labor costs. In any event, the finding that Coleman's labor in-put amounted to approximately $157,000 was based solely on Coleman's own assessment of the value of his work.

gress intended to facilitate the stockpiling of the public domain by investors hopeful that some future event—the development of a new use for the mineral causing a rise in prices or the development of new processing techniques lowering productions costs—would render a currently valueless mineral deposit marketable. Cf. *Brenner* v. *Manson,* 383 U.S. 519. To be sure, *Castle* v. *Womble* poses the issue in terms of whether a prudent man "would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine" (19 L.D. 457). But the phrase "reasonable prospect of success" would seem intended to take account of the period of development which usually must precede active marketing and of the inevitable element of uncertainty in economic matters; that phrase does not suggest that the Department must speculate as to future fluctuations in the marketplace that might figuratively transmute valueless minerals into a gold mine.

Thirdly, the problem of prospective market fluctuations becomes particularly acute when we focus on minerals, such as sand, gravel and stone, which are of very common occurrence and which at best can be marketed only within a small radius of the deposit. In such a localized market, value will often depend not on any continuing and constant demand but rather on the quite ephemeral and unpredictable demand that may be created by a particular project of limited duration such as the construction of a road or a housing development. See *United States* v. *Black,* 64 I.D. 93 (1957). In cases of this sort it has been thought

particularly inappropriate to issue a patent to public lands on the mere possibility that at some future time such a limited demand will arise; therefore evidence of an actually existing market for the minerals of a particular deposit has been required. See *Marketability Rule,* 69 I.D. 145. We submit that such a requirement serves the purpose of the mining laws, whereas the decision below would result in the validation of claims of purely conjectural value.

II. THE SECRETARY'S DETERMINATION THAT RESPONDENTS' BUILDING STONE IS A COMMON VARIETY OF STONE WITHIN THE MEANING OF 30 U.S.C. 611 WAS NOT AN ABUSE OF DISCRETION

Under 30 U.S.C. 611, which became effective on July 23, 1955, Congress provided that "[a] deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *." In the departmental proceedings, the Secretary held that Coleman's quartzite building stone was a common variety of stone within the meaning of Section 611 and hence that it was incumbent upon Coleman to show that all the requirements for the issuance of a patent had been met prior to the effective date of Section 611 (A. 11).

The court of appeals held that the term "stone" in Section 611 does not include "building stone" and that building stone is not a common variety of stone. In reaching this conclusion, the court did not challenge the factual basis for the Secretary's determi-

nation that Coleman's stone is a common variety. Rather, the court pointed out that 30 U.S.C. 161, enacted in 1892, made the mining laws applicable to "lands that are chiefly valuable for building stone." It noted further that Section 611, withdrawing common varieties of stone from coverage under the mining laws, was not intended, so far as the legislative history reveals, to repeal Section 161. It therefore concluded that Section 611 has no application to building stone and that "[s]tone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone" (A. 58).

We believe that the court was confused in several respects. First, Section 161 does not speak of "stone that is chiefly valuable as building stone"; it speaks of "lands that are chiefly valuable for building stone." Contrary to the court's apparent assumption, Section 161 did not establish the location of building stone as a new criterion for the issuance of a patent. Section 161 merely made applicable to land chiefly valuable for building stone the test previously established by Section 22, that is, the discovery of a valuable mineral deposit. Thus, Section 161 provided that such lands would be open to entry "under the provisions of the law in relation to placer mineral claims." Section 161 does not purport to determine whether any particular deposit of building stone is or is not a valuable mineral deposit which would warrant the issuance of a patent.[8]

[8] We recognize that there is a seeming paradox in supposing a tract of land that is chiefly valuable for building stone where the building stone itself is not valuable. But the fact that land

Section 611, on the other hand, deals expressly with the problem of what is and what is not a valuable mineral deposit by providing that common varieties of sand, stone, gravel and the like are not to be considered valuable. The legislative history makes clear that Section 611 was intended to remove common types of sand, gravel and stone from the coverage of the mining laws, under which they served as a basis for claims to fee patents, and to place the disposition of such material under the Materials Act of 1947 (30 U.S.C. 601), which provides for the sale of such materials without disposing of the land on which they are found. The chairman of the House Committee on Interior and Insular Affairs explained (101 Cong. Rec. 8743; emphasis added):

> The reason we have done that is because sand, stone, gravel * * * are really *building materials,* and are not the type of materials contemplated to be handled under the mining laws, and that is precisely where we have so much abuse under the mining laws * * *.

Similarly, the Senate committee report stated that the bill was intended to:

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may be barren of all opportunities for commercial development other than as a quarry does not demonstrate that there is a market for its stone. In the departmental proceedings in this case, the Forest Service did not dispute Coleman's assertion that the land in issue is chiefly valuable for building stone, and it therefore did not offer evidence as to the land's value for alternative uses. Such evidence might prove quite difficult to develop with respect to land in a national forest where use is highly restricted, sales of comparable land are rare, and many of the benefits derived from the land—*e.g.* recreation, wild life conservation, watershed protection—cannot readily be measured in dollars.

> Provide that deposits of common varieties of sand, *building stone,* gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872. [S. Rep. No. 554, 84th Cong., 1st Sess., at 2; emphasis added.]

Again, the chairman of the Senate Committee on Interior and Insular Affairs stated that under the bill "deposits of common varieties of sand, *building stone,* gravel * * * shall be disposed of under the Materials Act of 1947 rather than under the mining law of 1872" (101 Cong. Rec. 9334; emphasis added). See, also, Hearings on S. 1713, *Multiple Surface Uses of the Public Domain,* before the Senate Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., at 95–96, 103; Report of the House Committee on Interior and Insular Affairs on H.R. 5891, H. Rep. No. 730, 84th Cong., 1st Sess. Throughout the legislative process, the applicability of the proposed act to building stone was repeatedly asserted without question or doubt. Accordingly, there is simply no warrant for the court's *a priori* conclusion that "[s]tone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone".

Given the clarity of the legislation intent to reach building stone under Section 611, there would be little warrant for the court's resort to the rule of construction that "a general law is not held to repeal or supersede an earlier specific law in the absence of a definite expressed intention" (A. 58), even if it were necessary to conclude that the Secretary's reading of

Section 611 did assume repeal of Section 161. In fact, however, no such assumption is involved. Section 611 removed from the coverage of the mining laws only "common varieties" of building stone; it expressly defines the term "common varieties" as not including any deposit of stone, sand, gravel *etc.* that has "some property giving it distinct and special value." Thus, Section 161 remains entirely effective as to the relatively rare and uncommon varieties of building stone which are not covered by Section 611.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted.

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